

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

REGINALD HOWARD,

Plaintiff,

vs.

GARY HILL,

Defendant.

CV-N-04-0281-HDM (VPC)

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

July 20, 2006

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendant's motion to dismiss (#12). Plaintiff has failed to file an opposition.

The court has thoroughly reviewed the record and the motion and recommends that the motion to dismiss be granted.

**I. HISTORY & PROCEDURAL BACKGROUND**

Plaintiff Reginald Howard ("plaintiff") is a prisoner at High Desert State Prison ("HDSP") in the custody of the Nevada Department of Corrections ("NDOC") (#4). Plaintiff's claims arise from an incident at Nevada State Prison ("NSP"), where he was previously incarcerated. *Id.* Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983 for violations of his Eighth Amendment right against cruel and unusual punishment, his Fourteenth Amendment right to due process, and his right to be free from retaliation for exercising his First Amendment rights. *Id.*

1 Plaintiff also asserts that defendant violated state assault law. *Id.*; NRS 200.471. Plaintiff names  
2 as defendant Gary Hill, NSP correctional officer. *Id.*

3 In count I, plaintiff claims his Eighth Amendment right against cruel and unusual  
4 punishment was violated by defendant when defendant allegedly ordered plaintiff first to sit on  
5 hot rocks in the sun and then to lie on the ground with his face on the hot asphalt. *Id.* Plaintiff  
6 also claims his Fourteenth Amendment due process right and his Eighth Amendment rights were  
7 violated because defendant used excessive force without provocation and solely to cause pain and  
8 embarrassment and to instill fear in plaintiff.<sup>1</sup> *Id.*

10 In count II, plaintiff claims his First Amendment right against retaliation was violated  
11 when defendant filed an allegedly false notice of charges regarding the incident in retaliation for  
12 plaintiff filing a grievance and lawsuit regarding the incident. *Id.* Plaintiff also claims that the  
13 notice of charges violated his Fourteenth Amendment due process rights because it was filed two  
14 days late. *Id.* Plaintiff asserts that the disciplinary hearing violated his due process rights because  
15 he appeared before a single disciplinary committee member when the “Code” calls for two or  
16 three members to preside and because he was only allowed to call one witness. *Id.*

18 Plaintiff filed his complaint on May 26, 2004 (#4). However, previously he had alleged  
19 the exact same claims arising from the same incident in a previous case, *Howard v. Hill, et. al.*,  
20 CV-3:03-00493-HDM (RAM) (“*Howard I*”). In *Howard I*, defendants filed a motion to dismiss  
21 and argued that while plaintiff had exhausted his administrative remedies with respect to count  
22 I, he had not exhausted as to count II (*Howard I*, #6). The Court found that plaintiff had both  
23 exhausted and unexhausted claims in his complaint and gave him twenty days to either voluntarily  
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27 <sup>1</sup>The court notes that a claim of excessive force is properly analyzed under the Eighth Amendment.  
28 See *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Jordan v. Gardner*, 986 F.2d. 1521, 1528 (9th Cir.  
1993).

1 dismiss his count II claim with prejudice, or take no action, in which case the court would dismiss  
 2 the action without prejudice to enable plaintiff to exhaust his unexhausted claims (*Howard I*,  
 3 #11). Plaintiff failed to respond to the Court's order or to file an amended complaint; therefore,  
 4 the Court dismissed the complaint without prejudice (*Howard I*, #13).

5  
 6 When plaintiff filed a notice of appeal in *Howard I* (*Howard I*, #12), the court granted  
 7 defendant's motion for stay of proceedings in the present case ("*Howard II*") because the claims  
 8 in *Howard II* arise out of the exact same incident between plaintiff and defendant that is the  
 9 subject of *Howard I* (*Howard II*, #7). Count I in *Howard II* sets forth claims identical to those  
 10 set forth as count I in *Howard I* (*Compare Howard I*, #4 to *Howard II*, #4). Count II of *Howard*  
 11 *II* sets forth some of the claims raised in count II of *Howard I*. *Id.* Thus, all claims that plaintiff  
 12 alleges in *Howard II* were previously set forth in *Howard I*.<sup>2</sup> *Id.*

13  
 14 The Ninth Circuit Court of Appeals filed a memorandum decision in *Howard I*, in which  
 15 it reversed and remanded the District Court's judgment dismissing plaintiff's complaint (*Howard*  
 16 *I*, #24). Therefore, defendant has filed a motion to dismiss *Howard II* as it raises claims that will  
 17 now be litigated in *Howard I* (#12). Plaintiff has not filed an opposition to defendant's motion  
 18 to dismiss.  
 19

## 20 II. DISCUSSION & ANALYSIS

### 21 A. Discussion

22 Local Rule of Civil Practice 7-2 ("LR 7-2") provides that "the failure of an opposing party  
 23 to file points and authorities in response to any motion shall constitute a consent to the granting  
 24 of the motion."  
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 28 <sup>2</sup>In *Howard I*, plaintiff names NSP correctional officer Gobel and John Does 1 and 2 in addition to Hill (*Howard I*, #4).

1           **B. Analysis**

2           Defendant's motion to dismiss is granted because plaintiff failed to oppose the motion,  
3 as required by LR 7-2(d). Moreover, plaintiff sets forth the same claims in *Howard I*, which is  
4 currently proceeding in the District of Nevada (*Howard I*, #s 4, 24). Thus, the *Howard II*  
5 complaint is duplicative. Defendant's motion to dismiss is granted (#12).  
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7                           **III. CONCLUSION**

8           Based on the foregoing and for good cause appearing, the court concludes that plaintiff  
9 failed to respond to defendants' motion to dismiss as required by LR 7-2. As such, the court  
10 recommends that defendants' motion to dismiss (#12) be granted without prejudice.  
11

12           The parties are advised:

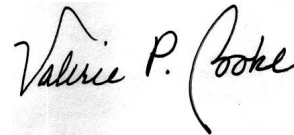
13           1. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice,  
14 the parties may file specific written objections to this report and recommendation within ten days  
15 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
16 Recommendation" and should be accompanied by points and authorities for consideration by the  
17 District Court.  
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19           2. This report and recommendation is not an appealable order and any notice of appeal  
20 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
21 judgment.  
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**III. RECOMMENDATION**

**IT IS THEREFORE RECOMMENDED** that defendant's motion to dismiss (#12) be  
**GRANTED.**

**DATED:** July 20, 2006.

A handwritten signature in black ink, reading "Valerie P. Cooke". The signature is written in a cursive style with a large, stylized 'V' and 'C'.

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**UNITED STATES MAGISTRATE JUDGE**